Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

MARVIN WARE,

Petitioner.

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

Gregory A. Adamski*
Karen Conti
Dawn Sheikh
Adamski & Conti
100 N. LaSalle Street
Chicago, Illinois 60602
312.332-7800

*Attorney of Record

34pp

QUESTION PRESENTED FOR REVIEW

Whether petitioner was denied fundamental due process under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), when he received a mandatory natural life sentence for his conviction of aggravated criminal sexual assault because he had a prior conviction for the same offense. Petitioner submits that the Illinois statute at issue--720 ILCS §5/12-14(d)(2)--is unconstitutional.

THE LIST OF ALL PARTIES TO THE PROCEEDING IN THE SUPREME COURT OF ILLINOIS

The parties to the proceedings in the Supreme Court of Illinois were respondent People of the State of Illinois and petitioner Marvin Ware.

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Petitioner Marvin Ware respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this case.

CITATION OF OFFICIAL AND UNOFFICIAL REPORTS

The decision of the Illinois Supreme Court was entered on October 3, 2001, is not officially reported, and is included in the Appendix. The decision of the Illinois Appellate Court was entered on May 22, 2001, is officially reported at 323 Ill.App.3d 47, and is included in the Appendix. The actions of the Circuit Court of Cook County, Illinois, are unreported.

JURISDICTIONAL STATEMENT

The judgment of the Illinois Supreme Court was entered on October 3, 2001. The Court's jurisdiction is invoked under 28 U.S.C. §1254(2).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states that:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces or in the militia when in actual service of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due

process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment states that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

The Fourteenth Amendment states, in part, that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall nay State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

Marvin Ware was convicted of aggravated criminal sexual assault and received a mandatory natural life sentence under §5/12-14d(2) of the Illinois Criminal Code, 720 ILCS 5/12-14(d)(2), because he had a prior conviction of the same

offense. He petitions the Court to issue a writ of certiorari from the appellate court's judgment and the Illinois Supreme Court's denial of his petition for leave to appeal.

Mr. Ware submits that §5/12-14(d)(2) is unconstitutional because it increases the penalty for an offense beyond the statutory maximum based upon facts that are not required to be pled before trial, submitted to a jury, or proven beyond a reasonable doubt, in violation of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000). The appellate court ruled that prior convictions are an exception to the rule in Apprendi and upheld §5/12-14(d)(2). People v. Ware, 323 Ill.App.3d 47, 751 N.E.2d 81 (2001). In doing so, the appellate court relied upon a series of recent Illinois decisions making similar holdings. See People v. Lathon, 317 Ill.App.3d 573, 740 N.E.2d 377 (2000); People v. Roberts, 318 Ill.App.3d 719, 743 N.E.2d (2000); People v. Ramos, 318 Ill.App.3d 181, 742 N.E.2d 763 (2000). The Court should accept this case for review to provide guidance on this issue.

STATEMENT OF FACTS

After a bench trial, the trial court found Mr. Ware guilty of aggravated criminal sexual assault. R. A143. At the sentencing hearing, the State introduced evidence that Mr. Ware had a prior conviction of aggravated criminal sexual assault from 1992. The trial court sentenced Mr. Ware to natural life in prison under 720 ILCS 5/12-14(d)(2). R. C15-16, C27-29.

On appeal, among other things, Mr. Ware argued that his extended-term sentence of natural life was based on an unconstitutional statute under Apprendi. The appellate court

rejected these contentions and affirmed Mr. Ware's sentence. Ware , supra.

ARGUMENT

MR. WARE'S ENHANCED SENTENCE IS UNCONSTITUTIONAL BECAUSE IT INCREASED THE PENALTY FOR THE UNDERLYING CRIME BEYOND ITS STATUTORY LIMIT, BUT DID NOT PLEAD THE ENHANCEMENT BEFORE TRIAL, PRESENT IT TO A JURY, OR PROVE IT BEYOND A REASONABLE DOUBT

Marvin Ware was convicted of aggravated criminal sexual assault under §5/12-14(d)(1) of the Criminal Code and received an "extended term" sentence of mandatory natural life sentence for his conviction of aggravated criminal sexual assault under 720 ILCS 5/12-14(d)(2)(1998) because he had a prior conviction for the same offense. R. C15-20, C27-29; C5, 76. Aggravated criminal sexual assault is a Class X felony with a penalty of 6 to 30 years in prison. 720 ILCS 5/12-14(d)(1)(1998); 730 ILCS 5/5-8-1(a)(3)(1998). Section 5/12-14(d)(2) imposes an "extended term" sentence of natural life in prison if the defendant has a prior conviction of aggravated criminal sexual assault, predatory criminal sexual assault of a child, criminal sexual assault, or a substantially equivalent offense. 720 ILCS 5/12-14(d)(2)(1998).

This statute violates Mr. Ware's constitutional rights to due process, fair notice, and trial by jury by permitting an increase in the penalty for an offense beyond the statutory maximum based on facts that are not required to be pled before trial, submitted to a jury, and proved beyond a

reasonable doubt. U.S. Const. Amends. V, VI, XIV; Apprendi, 530 U.S. at 490. Because §5/12-14(d)(2) is unconstitutional under Apprendi, the Court should grant review, invalidate the offensive statute, vacate Mr. Ware's life sentence, and remand the cause for a new sentencing hearing.

Our Constitution prohibits any deprivation of liberty without "due process of law" and a "speedy and public trial, by an impartial jury." Amends. 14, 6, U.S. Const. These rights entitle a criminal defendant to a "jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310 (1995).

In Apprendi, the Court struck down a New Jersey statute that allowed an extended-term sentence where a trial court finds by a preponderance of the evidence that, in committing an offense, a defendant acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity. Apprendi, 530 U.S. at 468-69. The Court held as a matter of due process that any fact, other than a prior conviction, that increases the penalty for an offense beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. Apprendi, 530 U.S. at 490. The Court ruled that these facts must be pled by the State before trial to satisfy constitutional guarantees of due process, fair notice, and trial by jury. Apprendi, 530 U.S. at 476, 490. In reaching its decision, the Court framed the issue as "whether the due process clause of the fourteenth amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense

from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." Id.

The Illinois statute at issue here bears the same constitutional defects as the New Jersey statute invalidated in Apprendi. Like the New Jersey statute, the Illinois statute permits an extended-term sentence to be imposed in violation of constitutional guarantees of due process, fair notice, and trial by jury. Section 5/12-14(d)(2) violates Apprendi because it authorizes the imposition of an extended-term sentence based upon facts regarding the existence of a prior conviction that are not required to be pled before trial, submitted to a jury, or proven beyond a reasonable doubt.

Because the statute under which Mr. Ware was sentenced subjected him to a sentence beyond the statutory maximum based on a prior conviction, this case presents an issue left open by Apprendi. The Court should grant the petition for a writ of certiorari and provide guidance to lower courts.

Enhanced sentencing based upon prior convictions are unconstitutional according to the principles of Apprendi. Mr. Ware acknowledges that, in dicta, the Apprendi Court stated that the existence of prior convictions were excluded from its general holding regarding other facts that increase the penalty for an offense beyond the statutory maximum. This exclusion does not bar Mr. Ware's claim.

Apprendi did not *hold* that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490, 120 S.Ct. at 2362-63. This

statement is merely dicta. The Court's jurisprudence on this subject consistently rests upon the principle that a sentence cannot be enhanced beyond the statutory maximum penalty of the convicted crime unless the enhancement issues are pled, presented to the jury, and proven.

Prior convictions were not at issue in Apprendi. In fact, despite its rather straightforward comment about prior convictions, the Court noted that it may expand the Apprendi holding to require pleading and proof of prior convictions in some cases. It considered Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219 (1998), which held that the failure of an indictment to allege a prior conviction that subjected a defendant to increased punishment was not a violation of due process. The Apprendi Court stated that it was arguable that Almendarez-Torres was incorrectly decided and treated it as a narrow exception limited to cases where a defendant admits his recidivism. Apprendi, 530 U.S. at 489. The instant case is outside the scope of the Almendarez-Torres exception. The Court concluded that its general holding would apply if the recidivist issue were contested. Apprendi, 530 U.S. at 489-90. In his concurrence, Justice Thomas went one step further and declared that a prior conviction, subjecting a defendant to an increased sentence, is an element of the offense and must be proven to a jury beyond a reasonable doubt. Apprendi, 530 U.S. at 501, 521 (Thomas, J., concurring).

Furthermore, in distinguishing Almendarez-Torres, the Apprendi Court recognized: "Both the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise

implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." Apprendi, 530 U.S. at 488 , 147 L.Ed2d at 454, 120 S.Ct. at 2362. The procedural safeguards in this case do not sufficiently mitigate Mr. Ware's due process and Sixth Amendment concerns.

Although procedural safeguards may attach to the fact of Mr. Ware's record of a prior conviction, the "fact" of his recividism has not been determined with appropriate procedural safeguards in place. Mr. Ware pled guilty to the offense that now constitutes the 'fact' of his prior conviction after spending three and a half years in the County jail awaiting his trial. He was sentenced to 6 years in prison, but was released from custody on the day he entered his guilty plea. Mr. Ware waived his right to a jury trial with an understanding only of the sentence he faced for that offense. He did not knowingly, intelligently, and willingly waive his Sixth Amendment right to a jury trial where he faced life imprisonment and he did not have fair notice of the penalties that he faced.

Mr. Ware also waived his right to jury trial in the present case as well. Again, he did not do so knowingly, intelligently, and willingly. Following a bench trial, evidence of Mr. Ware's prior conviction was introduced at the sentencing hearing. Mr. Ware did not have fair notice of the penalties that he faced. Therefore, he could not waive his right to jury trial knowingly or intelligently.

MR. WARE'S ENHANCED SENTENCE IS UNCONSTITUTIONAL BECAUSE IT IS BASED UPON FACTS OTHER THAN THE EXISTENCE OF PRIOR CONVICTIONS

Section 5/12-14(d)(2) requires additional qualifying facts that go beyond the mere existence of another conviction. To make a defendant eligible for an extended-term sentence under the Illinois statute, the other conviction must have occurred before the current conviction. If the other conviction is not for one of the enumerated offenses, then the other conviction must be for an offense that is "substantially equivalent" to one of the enumerated offenses. Accordingly, even if the existence of another conviction is excluded from the general holding, these additional qualifying facts regarding the other conviction are not. As a result, they must be pled before trial, submitted to the jury, and proved beyond a reasonable doubt to satisfy the constitutional standards enunciated in Apprendi.

CONCLUSION

For the foregoing reasons, petitioner Marvin Ware respectfully requests that the Court grant the petition for a writ of certiorari, issue the writ, hear this case on its merits, invalidate the Illinois statute at issue, vacate his life sentence, and remand this case to the Illinois courts for further proceedings.

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Petitioner Ware's Attorney

Gregory A. Adamski
Karen Conti
Dawn Sheikh
Adamski & Conti
100 N. LaSalle Street
Chicago, Illinois 60602
312.332-7800